

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Applications of
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.
For Authority to Construct New Instructional Television Fixed Service Station On the C Group Channels, Milwaukee, Wisconsin
and
MILWAUKEE REGIONAL MEDICAL INSTRUCTIONAL TELEVISION STATION, INC.
For Renewal of Instructional Television Fixed Service Station WAU27 License, On the C Group Channels, Milwaukee, Wisconsin
File No. BPLIF-19951016BW
File No. 0001756364

MEMORANDUM OPINION AND ORDER

Adopted: January 5, 2005

Released: January 12, 2005

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we consider an Application for Review filed on October 29, 2003, by Hispanic Information and Telecommunications Network, Inc. (HITN). HITN requests Commission review of the staff's dismissal of the above-captioned application for authority to construct an Instructional Television Fixed Service (ITFS) station in Milwaukee, Wisconsin. For the reasons stated herein, we grant HITN's AFR in part but ultimately affirm the dismissal of HITN's application. In addition, we dismiss a related petition for reconsideration filed by HITN against the grant of the renewal application of ITFS Station WAU27, Milwaukee, Wisconsin, licensed to Milwaukee Regional Medical Instructional Television Station, Inc. (MRMI).

1 Application for Review (filed Oct. 29, 2003) (AFR).

2 On July 29, 2004, we released a comprehensive restructuring of the rules relating to ITFS and the Multipoint Distribution Service (MDS). Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, et al.; WT Docket Nos. 03-66, et al., Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) (MDS/ITFS R&O & FNPRM). As part of that restructuring, ITFS was renamed the Educational Broadband Service (EBS). Because this case involves applications filed under the old rules, and because the new rules have not yet taken effect as of the adoption of this Memorandum Opinion and Order, we will use the old name for the service in this order.

3 Request for Rescission or Petition for Reconsideration (filed Oct. 29, 2004) (Renewal Petition).

II. BACKGROUND

2. On February 25, 1993, the Commission imposed a freeze on the acceptance of new and major change ITFS applications.⁴ As an exception to that freeze, however, the Commission stated that it would continue to receive (but not process) applications in which the applicant relies on the National Telecommunications and Information Administration (NTIA) for construction funds. This exception was necessary because NTIA required applicants to file applications with the Commission before seeking funding.⁵ The Commission stated that such applications would be cut-off as of the end of the first filing window.⁶

3. On May 12, 1994, HITN filed an application for a new ITFS station on the C Group channels⁷ at Milwaukee, Wisconsin.⁸ Because HITN's new station application for Milwaukee was filed under the filing exception and during the filing freeze, it was determined that it would be considered filed during the October 16 - October 20, 1995 filing window. The application was given a filing date of October 16, 1995. On November 9, 1995, along with all the applications received during this filing window, HITN's application appeared on Public Notice as tendered for filing.⁹

4. MRMI is the licensee of ITFS Station WAU27, Milwaukee, Wisconsin. At the time HITN filed its application, Station WAU27 operated on Channels E1 and E2.¹⁰ On June 9, 1994, the Commission partially lifted the freeze to allow major change applications to be filed with respect to existing facilities.¹¹ On August 22, 1994, after HITN filed its application, MRMI filed a major change application to move Station WAU27 to Channels C2 and C3.¹² That application did not study or otherwise reference HITN's pending application. Notwithstanding the pendency of HITN's application, MRMI's major change application was granted on May 12, 1995.¹³ HITN did not file a petition to deny against MRMI's application, nor did it seek reconsideration of the grant of MRMI's application. Subsequently, on September 14, 1995, MRMI filed a second major change application to add Channels C1 and C4 to the license for Station WAU27.¹⁴ That application was granted on May 13, 1998.¹⁵

⁴ Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Notice of Proposed Rulemaking*, 8 FCC Rcd 1275, 1277 ¶ 9 (1993).

⁵ *Id.*

⁶ *Id.*

⁷ The C Group channels are located at 2548-2554 MHz (C1), 2560-2566 MHz (C2), 2572-2578 MHz (C3), and 2584-2590 MHz (C4). See 47 C.F.R. § 74.902(a).

⁸ File No. BPLIF-19951016BW (filed May 12, 1994).

⁹ See ITFS Public Notice, Report No. 23631A, *Public Notice* (rel. Nov. 9, 1995).

¹⁰ Channel E1 is located at 2596-2602 MHz, and channel E2 is located at 2608-2614 MHz. See 47 C.F.R. § 21.901(b)(4).

¹¹ Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Order and Further Notice of Proposed Rulemaking*, 9 FCC Rcd 3348, 3354 ¶ 43 (1994).

¹² File No. BMPLIF-19940822DA.

¹³ Broadcast Actions, Report No. 43515, *Public Notice* (rel. May 25, 1995).

¹⁴ File No. BLMPFIF-19950914HI. The two MRMI applications (BMPLIF-19940822DA and BLMPFIF-19950914HI) will be collectively referred to as the "Station WAU27 Applications."

¹⁵ Broadcast Actions, Report No. 44247, *Public Notice* (rel. May 22, 1998).

5. On December 17, 1997, the Acting Chief, Distribution Services Branch, Video Services Division, former Mass Media Bureau (Branch) dismissed HITN's application.¹⁶ The HITN application was dismissed because its proposed facility was predicted to cause co-channel interference to Station WAU27.¹⁷

6. On January 22, 1998, HITN filed a Petition for Reconsideration.¹⁸ Concurrent with the filing of its Petition, HITN submitted an amendment to its application requesting the deletion of channels C2 and C3 from HITN's original proposal.¹⁹ In its Petition, HITN did not dispute the finding that the proposal contained in its original application would cause interference to Station WAU27. Alternatively, HITN claimed that the amendment it submitted with its Petition would avoid interference to Station WAU27's licensed facilities.²⁰ Thus, HITN claimed its application, as amended, should be reinstated.²¹

7. On September 29, 2003, the Chief of the former Public Safety and Private Wireless Division (Division) of the Wireless Telecommunications Bureau denied the Petition.²² In its decision, the Division found that: 1) HITN failed the threshold requirement to obtain reconsideration, 2) Section 1.106(c) was not applicable in this case, and 3) the amendment, because of the time frame of its filing, would not be considered.²³ On October 29, 2003, HITN submitted the instant AFR.

8. On May 28, 2004, MRMI filed an application for renewal of license of Station WAU27.²⁴ On July 2, 2004, HITN filed a petition to deny MRMI's renewal application.²⁵ HITN argued that the Station WAU27 Applications should not have been granted.²⁶ On September 24, 2004, the renewal application was granted without consideration of HITN's petition to deny.²⁷ HITN filed the instant Renewal Petition on October 29, 2004.

III. DISCUSSION

9. In its AFR, HITN makes several arguments in support of reinstating its application. First, HITN argues that WAU27, at the time of the filing of HITN's application, had not applied for or been licensed on the C2 and C3 channels and therefore the staff erred in dismissing HITN's application for

¹⁶ See Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to HITN (dated Dec. 17, 1997) (Dismissal Letter). Public notice of the dismissal was given on December 23, 1997. See Broadcast Actions, Report No. 44144, *Public Notice* (rel. Dec. 23, 1997).

¹⁷ See Dismissal Letter.

¹⁸ Petition for Reconsideration (filed Jan. 22, 1998) (Petition).

¹⁹ See Exhibit A, FCC Form 330 filed with Petition. Thus, this application as amended seeks to license only channels C1 and C4.

²⁰ Petition at 2.

²¹ *Id.* At 3.

²² See Hispanic Information and Telecommunications Network, Inc., *Order on Reconsideration*, 18 FCC Rcd 19298 (WTB PSPWD 2003)(Division Order).

²³ *Id.*

²⁴ File No. 0001756364.

²⁵ Petition to Deny Renewal or Opposition to Application for Renewal of License (filed Jul. 2, 2004) (Petition to Deny).

²⁶ *Id.* at 2-3.

²⁷ Public notice of the grant was given on September 29, 2004. Wireless Telecommunications Bureau Site-By-Site Action, Report No. 1947, *Public Notice* (rel. Sep. 29, 2004) at 15.

failure to study Station WAU27.²⁸ Second, the Branch erred when it accepted the application of Station WAU27 because it failed to study or protect HITN's pending Milwaukee application.²⁹ Third, HITN notes that the Branch did not issue a public notice announcing the mutual exclusivity between the HITN application and MRMI's applications.³⁰ Last, HITN argues that the Branch erred when it granted MRMI's application without considering HITN's competing application.³¹

10. Based upon the information before us, it now appears that HITN is correct that the Station WAU27 Applications, which were filed after HITN's Milwaukee application, should have been considered mutually exclusive with HITN's Milwaukee application. While the Commission stated that applications such as HITN's would be deemed cut-off as of the first application filing window for new stations,³² the Commission never indicated that the applications should be deemed filed as of a later date, nor did it state that later-filed applications should be processed without regard to the earlier filed applications for new stations. Accordingly, we believe it was error to grant the Station WAU27 Applications without considering HITN's application.

11. Notwithstanding the error in granting the Station WAU27 Applications, we cannot reinstate HITN's application for two key reasons. First, the Branch's decisions granting the Station WAU27 Applications are now final actions. Second, regardless of past events, HITN now lacks standing to challenge the grant of the Station WAU27 Applications.

12. HITN could have brought the Branch's errors to the Commission's attention by filing petitions for reconsideration of the grant of the Station WAU27 Applications.³³ Unfortunately, HITN did not do so. The grant of the Station WAU27 Applications therefore became final actions.

13. In the absence of a timely petition for reconsideration from HITN, the Commission may not independently revisit the grants of the Station WAU27 Applications on our own motion. We believe that revisiting those grants would be inconsistent with the Commission's decision in *Steven S. Bosshard d/b/a Bosshard Radio Services*.³⁴ In that case, the former Licensing and Technical Analysis Branch (L&TAB), Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, dismissed the subject application on the basis that it was inconsistent with a particular 47 C.F.R. Part 90 rule provision, and did not include a waiver request.³⁵ Bosshard then filed a request for reconsideration of L&TAB's decision and requested a waiver of the relevant rule provision. Subsequently, L&TAB granted him a waiver and reinstated his application for further processing.³⁶ Seven months later, however, L&TAB denied Bosshard's reconsideration petition and waiver request, and dismissed the associated application.³⁷ The Commission held that because thirty days had passed between (a) the date when

²⁸ AFR at ii and iii.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service, *supra*, 8 FCC Rcd at 1277 ¶ 9.

³³ 47 C.F.R. § 1.106.

³⁴ Steven S. Bosshard D/B/A Bosshard Radio Services, *Memorandum Opinion and Order*, 14 FCC Rcd 20586 (1999).

³⁵ *Id.*, 14 FCC Rcd at 20588.

³⁶ *Id.*

³⁷ *Id.*

L&TAB granted him a waiver and reinstated his application, and (b) the date when L&TAB dismissed the application, Section 1.113(a) of the Commission's Rules had been violated.³⁸ Section 1.113(a) provides that a person, panel or board action pursuant to delegated authority has thirty days to modify or set aside its decision on its own motion.³⁹ Similarly, in the instant case, if we were to revisit the grant of the Station WAU27 Applications, we believe such action would be inconsistent with Section 1.113(a). HITN has not explained why it failed to file a timely petition for reconsideration of the grants. Under these circumstances, we affirm the dismissal of HITN's Milwaukee application.

14. Moreover, even if we were somehow able to overlook the fact that the grants had become final actions, we would still not reinstate HITN's application. In this proceeding, HITN has sought to have its application be considered mutually exclusive with the Station WAU27 Applications.⁴⁰ Recently, as part of a fundamental restructuring of the rules relating to MDS and ITFS, we dismissed all pending mutually exclusive ITFS applications.⁴¹ If we reinstated HITN's application and returned the Station WAU27 Applications to pending status, we would immediately dismiss all the applications pursuant to our decision in the *MDS/ITFS R&O & FNPRM*. In essence, HITN now lacks standing to challenge the grant of the Station WAU27 Applications. In order to have standing, a petitioner must establish a causal link between the claimed injury and the challenged action by demonstrating that the injury can be traced to the challenged action and that the injury would be prevented or redressed by the relief requested.⁴² At this point in time, returning the MRMI applications to pending status would not redress HITN's injury (*i.e.*, the dismissal of its application) because there is now another, independent basis for dismissing HITN's application.

15. Finally, we dismiss HITN's Renewal Petition directed against MRMI's renewal application.⁴³ HITN fails to provide any reason why MRMI's renewal application should be denied. Initially, we agree with HITN that MRMI's renewal application should not have been granted without consideration of HITN's petition to deny.⁴⁴ In light of the fact that we are fully considering HITN's arguments made in the Petition to Deny and Renewal Petition in this *Memorandum Opinion and Order*, however, we find that HITN has not been harmed. In the Renewal Petition, HITN does not question MRMI's qualifications to remain a Commission licensee. Instead, HITN's arguments focus exclusively on why the Station WAU27 Applications should not have been granted.⁴⁵ As such, we believe that the Renewal Petition is in fact an untimely petition for reconsideration of the grants of the Station WAU27 Applications and must be dismissed.⁴⁶ Section 405 of the Communications Act, as amended, sets forth

³⁸ *Id. citing* 47 C.F.R. § 1.113(a).

³⁹ 47 C.F.R. § 1.113(a). In another case involving Section 1.113(a), the Commission held that the Branch is not authorized to rescind a decision regarding applications for station modification, after the Section 1.113(a) thirty-day period had elapsed. *See County of San Mateo, California, Order on Review and Reconsideration*, 16 FCC Rcd 4291 (2001).

⁴⁰ AFR at 9.

⁴¹ *MDS/ITFS R&O & FNPRM*, 19 FCC Rcd at 14264-65 at ¶¶ 261-263.

⁴² Americatel Corporation, Memorandum Opinion, *Order, Authorization and Certificate*, 9 FCC Rcd 3993, 3995, ¶ 9 (1994).

⁴³ The Commission did not receive, from MRMI, a response to HITN's Renewal Petition.

⁴⁴ *See* 47 U.S.C. § 309(d)(2) (if Commission denies a petition to deny, it must issue a concise statement of reasons that shall dispose of all substantial issues raised by the petition).

⁴⁵ Petition to Deny at 2-3.

⁴⁶ *See Oregon State University, Order on Reconsideration*, 18 FCC Rcd 23881, 23884 ¶ 10 (WTB PSPWD 2003) (staff declines to reconsider grant of protected service area to ITFS station in the context of the dismissal of petitioner's application based upon interference to that protected service area).

the requirements that a petitioner must satisfy, before we may consider the petitioner's pleadings on reconsideration.⁴⁷ Section 405, as implemented by Section 1.106(f) of the Commission's Rules, requires a petition for reconsideration to be filed within thirty days from the date of public notice the Commission's action.⁴⁸ In this case, public notice of the grants of the Station WAU27 Applications was given on May 25, 1995 and May 22, 1998, respectively.⁴⁹ Since HITN's attempt to challenge the grants of the Station WAU27 Applications is grossly untimely, we must dismiss the Renewal Petition.⁵⁰

IV. CONCLUSION AND ORDERING CLAUSES

16. HITN is correct that its application should have been considered mutually exclusive with the major change applications filed by MRMI. We decline to reinstate HITN's application, however, because the grants of the Station WAU27 Applications have become final actions. Moreover, since we have recently ordered the dismissal of mutually exclusive ITFS applications, we would not reinstate HITN's application at this time. We dismiss HITN's petition to deny Station WAU27's renewal application as an untimely attempt to reconsider the grants of the Station WAU27 Applications.

17. ACCORDINGLY, IT IS ORDERED that pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5) and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by Hispanic Information and Telecommunications Network, Inc. on October 29, 2003, IS GRANTED to the extent indicated and is otherwise DENIED.

18. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309 and Section 74.912 of the Commission's Rules, 47 C.F.R. § 74.912, that the Request for Rescission or Petition for Reconsideration filed by Hispanic Information and Telecommunications Network, Inc. on October 29, 2004 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁷ 47 U.S.C. § 405.

⁴⁸ 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

⁴⁹ Broadcast Actions, Report No. 43515, *Public Notice* (rel. May 25, 1995); Broadcast Actions, Report No. 44247, *Public Notice* (rel. May 22, 1998).

⁵⁰ See Red Hot Radio, Inc., *Memorandum Opinion and Order*, 19 FCC Red 6737, 6743 ¶ 14 (2004).